

# Decision Notice



Decision 164/2010 Mr Steven Vass of the Sunday Herald and Scottish Futures Trust

KPMG report on alternative structures and future funding for Scottish Water

Reference No: 201000836

Decision Date: 13 September 2010

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**Kevin Dunion**

Scottish Information Commissioner

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## Summary

Mr Steven Vass requested from Scottish Futures Trust (SFT) information pertaining to the future funding of Scottish Water. SFT disclosed some information but withheld a KPMG report under a number of exemptions in Part 2 of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, Mr Vass remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that SFT dealt with Mr Vass' request for information in accordance with Part 1 of FOISA. The Commissioner found that SFT was entitled to withhold the KPMG report under section 30(b)(i) of FOISA.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); and 30(b)(i) (Prejudice to effective conduct of public affairs).

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

## Background

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1. On 25 January 2010, Mr Vass emailed the Scottish Futures Trust (SFT) requesting the following:
  - a. All communications between the SFT and (a) Scottish Water, (b) Scottish government ministers, (c) civil servants, (d) consultants and (e) any other interested parties regarding the future funding of Scottish Water.
  - b. Any reports published as a consequence of the SFT's work, either by the SFT itself or any third parties
2. In subsequent communications by telephone on 12 February 2010, Mr Vass' request was clarified and narrowed to seek the following:
  - a. All communications between the SFT and (a) Scottish government ministers, (b) civil servants regarding the future funding of Scottish Water.



- b. A KPMG report regarding alternative structures and future funding for Scottish Water.
3. On 24 February 2010, SFT responded to this request (and another which is not the subject of this decision). SFT provided Mr Vass with information in relation to part a of his clarified request and withheld the KPMG report under section 30(b) of FOISA.
4. On 26 February 2010, Mr Vass emailed SFT requesting a review of its decision to withhold the KPMG report. In particular, Mr Vass commented that the future ownership of the water provider is so important that the public interest must be given greater emphasis.
5. SFT notified Mr Vass of the outcome of its review on 29 March 2010. SFT upheld its previous response without amendment and in addition applied the exemption in section 33(1)(b) of FOISA to withhold the KPMG report.
6. On 20 April 2010, Mr Vass emailed the Commissioner, stating that he was dissatisfied with the outcome of SFT's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Mr Vass had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

## Investigation

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8. On 12 May 2010, SFT was notified in writing that an application had been received from Mr Vass and was asked to provide the Commissioner with a copy of the KPMG report. SFT responded with the information requested and the case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted SFT, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, SFT was asked to justify its reliance on any provisions of FOISA it considered applicable to the information withheld.
10. SFT responded on 21 June 2010 providing its submissions as to why it considered the exemptions in section 30(b) of FOISA applied to the KPMG report. It no longer sought to rely upon the exemption in section 33(1)(b) of FOISA to withhold this information.
11. The investigating officer also contacted Mr Vass and obtained his submissions on the case, and in particular on the public interest in disclosure of the KPMG report.



## Commissioner's analysis and findings

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12. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Vass and SFT and is satisfied that no matter of relevance has been overlooked.
13. The information under consideration is a report prepared for SFT by KPMG to consider alternative structures and funding options for Scottish Water. It was delivered to SFT at the end of November 2009, approximately two months before the date of Mr Vass' information request.
14. SFT withheld the KPMG report under the exemptions in section 30(b)(i) and (ii) of FOISA. The Commissioner first considered the exemption in section 30(b)(i).

### Section 30(b)(i) –Inhibition to the free and frank provision of advice

15. As the Commissioner has commented in previous decisions, the standard to be met in applying the tests contained in section 30(b)(i) is high. Where a public authority finds that certain information falls within the scope of the exemption, it is then required to go on to consider the application of the public interest test laid down in section 2(1)(b) of FOISA.
16. In order for SFT to be able to rely on the exemption laid down in section 30(b)(i) of FOISA, it would have to show that the disclosure of the KPMG report under FOISA would, or would be likely to, inhibit substantially the free and frank provision of advice. The Commissioner's views on the application of this exemption (along with that contained in section 30(b)(ii)) have been set out at length in a number of decisions, most notably *Decision 089/2007 Mr James Cannell and Historic Scotland* and *Decision 105/2008 Mr Rob Edwards and the Scottish Ministers*.
17. While he will not repeat these views in full, the Commissioner would reiterate that, in coming to a decision on the application of these exemptions, he will consider the actual information withheld, not simply the category of information to which it belongs or the situation in which the request has arisen. It cannot necessarily follow from the Commissioner requiring release of one particular piece of information that such information will require to be disclosed routinely in the future. The Commissioner looks for public authorities to demonstrate a real risk or likelihood that actual harm will occur at some time in the near (certainly the foreseeable) future, not simply that harm is a remote possibility. Also, the harm in question should take the form of substantial inhibition from expressing advice in as free and frank a manner as would be the case if disclosure could not be expected to follow. The word "substantial" is important here: the degree to which a person will or is likely to be inhibited in expressing themselves has to be of some real and demonstrable significance.
18. In its submissions, SFT explained that its role is to provide independent, unbiased and candid expert advice to public authorities and the Scottish Ministers (the Ministers) that is free from external political influence. It explained that the issue of alternative structures and funding options for Scottish Water was one where it had been asked to provide independent and confidential advice.



19. SFT explained that it had commissioned the KPMG report as part of its evaluation of alternative structures and funding options of Scottish Water and that it was an integral part of that evaluation, which would influence its advice to Ministers. SFT advised that the KPMG report contained sensitive material and discusses options which would undoubtedly be regarded by some as controversial.
20. SFT went on to comment that it was withholding the KPMG report because it believed that its release would be seriously detrimental to its work. It submitted that disclosure would be likely to inhibit substantially its staff in providing free and frank advice in the future. It noted that part of its raison d'etre is to give serious thought to options which may be highly controversial and analyse these in a rational and independent way, at the early stages in policy development process.
21. SFT explained that it had not disclosed the KPMG report at the time it was requested by Mr Vass, as it considered that it was likely, if not inevitable that this would have attracted adverse political comment and criticism and would have resulted in options being discounted before they had been fully explored.
22. SFT indicated that while its staff would behave professionally, the possibility that material upon which advice is based may be released before the advice itself had been formulated it would be likely to have the effect of inhibiting them from proposing options most likely to cause controversy. SFT suggested also that, in these circumstances, those receiving its advice would be more likely to doubt the independence and comprehensiveness of that advice.
23. SFT also stressed that the timing of Mr Vass' request was a significant factor in this case. SFT noted that it had not concluded its advice to Ministers, although a report had been issued in draft form. It went on to indicate that it may be that once the advice had been given and policy decisions taken, the material used by SFT in producing that advice could be capable of release without harmful effects.
24. Mr Vass commented that he did not consider that there would be much harm at all from disclosing the KPMG report. While recognising that the report considered a sensitive subject, he maintained that he could not see why KPMG would be inhibited by its disclosure.

#### **Conclusions on section 30(b)(i)**

25. The Commissioner has considered the KPMG report alongside the comments from both Mr Vass and SFT. He has also noted the timing of Mr Vass' request with respect to the process of SFT providing its advice to the Scottish Ministers.
26. While the Commissioner has some sympathy with the comments made by Mr Vass regarding the risk of inhibition to KPMG, he notes that SFT's arguments have focussed on potential inhibition to the free and frank provision of advice by its own staff.



27. Mr Vass made his request at the point where SFT had not yet finalised its own advice to the Ministers, which was informed by (but not the same as) the KPMG report. The Commissioner accepts that, disclosure at the time of Mr Vass' request and subsequent request for review would have been likely to inhibit substantially the free and frank provision of advice to Ministers by SFT staff. He accepts that, at that time, the matters discussed within the KPMG report were still under consideration, and SFT's own advice still under development.
28. He accepts that, if the report had been disclosed at the time of Mr Vass' request and subsequent review, the consequent reporting and discussion of this report would have been likely to require SFT to defend the consideration of options therein or debate their merits even if these were not going to form part of its own advice to Ministers. He accepts that this would have been likely to inhibit substantially SFT from putting forward options in the face of responses made by politicians and others even before its full and considered advice had been given.
29. The Commissioner notes SFT's comment that, once its advice was given and the policy decision taken, background information (such as the KPMG report) may be capable of release. SFT published its own report to Ministers in July 2010. However, since the finalisation and publication of this advice post-dates the handling of Mr Vass' request by SFT it has been disregarded within this decision. As noted in previous decisions, the Commissioner must consider the handling of a request at the point where the authority notified the applicant of the outcome of its review. In this case, the relevant date is 29 March 2010.
30. Consequently the Commissioner is satisfied that section 30(b)(i) was correctly applied to the KPMG report at the time of its review of Mr Vass' information request, in that the disclosure of that information at that time would or would have been likely to inhibit substantially the free and frank provision of advice (in this particular case, to the Scottish Ministers on the subject of future options for Scottish Water). As he is satisfied that section 30(b)(i) was correctly applied he will now go on to consider the public interest test contained in section 2(1)(b) of FOISA.

### **Public Interest Test**

31. SFT has submitted that it is clearly in the public interest that Ministers and other public sector stakeholders should be able to consider SFT's evaluation and advice and any sources that informed these in private and form a considered view of highly sensitive issues in private.
32. SFT indicated that it believed that the public would understand that Ministers need a degree of freedom to consider the options on the understanding that such policy decisions will be made public by the Ministers in due course and at that stage opened to debate.
33. It also commented if it was inhibited from advising on novel or controversial or unpopular options it will not be fulfilling its role for which it was established and if public bodies are inhibited from discussing such options SFT will not have achieved what it was intended to achieve. SFT commented that it is publicly funded and it will not be in the public interest if it can not undertake its role effectively.





34. Mr Vass has argued on the other hand that the future ownership of Scotland's water provider is too important to be debated behind closed doors. He submitted that the public has the right to know about the extent to which privatisation is on the agenda. He argued further that the Scottish Government has not been entirely open on the possibility of a policy change in this area and that, consequently, the public interest is stronger than usual. He argued that the public interest in non-disclosure was outweighed by that in allowing full understanding of the policy debate on the future of water ownership.

### **Conclusions on the public interest test**

35. Having considered the public interest both for and against disclosure identified by SFT and Mr Vass, the Commissioner concludes that there is no doubt that the future structure, ownership and funding of Scottish Water is a matter of significant public interest. The Scottish nation relies upon Scottish Water for the provision, treatment and disposal of water, and most households contribute to the cost of these services.
36. The options and recommendations made by SFT will influence the Ministers' decisions on future funding of Scottish Water, a matter of some controversy. Therefore the argument that there should be an opportunity to see what options were or are being considered, put forward or discarded before decisions are taken, to allow public participation in decision making is readily acknowledgeable.
37. Since the advice and recommendations made by SFT will influence the Ministers' thinking and policy development in these areas, the Commissioner recognises that there is a substantial public interest in disclosure of that advice, and the KPMG report which informed its preparation.
38. However, against disclosure, the information under consideration is contained in a report from consultants which was at the relevant time under consideration by SFT, which would in turn make a report to Ministers. It does not represent a decision on the future of Scottish Water or SFT's views on what that future should be.
39. The purpose of SFT is to be robustly independent in the giving of sometime unpalatable or controversial advice. Ministers can chose to accept or reject that advice, but it is in the public interest that, having asked for advice, they should receive fully considered views.
40. The Commissioner notes that Ministers cannot simply implement a policy decision based upon that advice. It would subsequently be a matter of Parliamentary scrutiny and public consultation. SFT's decision to withhold the KPMG report at the time of Mr Vass' request and subsequent review does not prevent future opportunities to engage with and influence the decision making process once the Ministers have received and formed their views in the light of SFT's advice.
41. In all the circumstances, the Commissioner has found that there was at the relevant time a significant public interest in SFT being able to consider a range of options, some of which would be discarded or developed further, and to put these to Ministers to subsequently allow a fully informed but focused public debate.



42. Bearing in mind the timing of Mr Vass' request, and recognising that the public interest in non-disclosure would be likely to diminish over time, the Commissioner has concluded that at the relevant time the public interest in disclosure of the KPMG report was outweighed by the public interest in maintaining the exemption in section 30(b)(i).
43. As the Commissioner has found that the KPMG report was correctly withheld under section 30(b)(i) he did not go onto consider the application of section 30(b)(ii) to the withheld information.

#### **Comment on SFT's approach to the public interest test**

44. The Commissioner wishes to comment briefly on SFT's approach to the public interest test in this case. He has noted SFT's correspondence with Mr Vass and its submissions to him in relation to this test focussed solely in the public interest in maintaining the exemptions applied to the KPMG report.
45. While he has accepted that the public interest favoured the maintenance of the exemption in section 30(b)(i), he would point out that the public interest test requires a balancing between the public interest both for and against disclosure of information.
46. The Commissioner's briefing on the public interest test<sup>1</sup> highlights the requirement in section 16(2) that a refusal notice must (where the public interest applies to an exemption being applied) state why the authority believes that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information. The guidance states:

It is therefore not enough for a public authority simply to say, e.g., in a refusal notice, that the public interest lies in maintaining the exemption. It must set out the competing public interest arguments and explain why it has concluded that the public interest lies in maintaining the exemption as opposed to releasing it. Without this information public authorities may find it difficult to justify their decisions on the public interest if an application is subsequently made to the Commissioner.

47. SFT's comments to the Commissioner suggested that it did not appreciate or give appropriate consideration to the public interest in disclosure of the report when conducting this test. If it did give appropriate consideration to the public interest in disclosure, this was not communicated to either Mr Vass or the Commissioner. While this decision does not require any action by SFT, the Commissioner would recommend that it notes the terms of his guidance on the public interest test and takes any necessary steps to ensure that its future consideration of this test:
  - a. includes appropriate consideration of the public interest in disclosure, and
  - b. communicates this consideration more fully to the applicant.

<sup>1</sup> <http://www.itpublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2677&sID=684>





## DECISION

The Commissioner finds that Scottish Futures Trust (SFT) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Vass. The Commissioner found that SFT was entitled to withhold the KPMG report under section 30(b)(i) of FOISA.

## Appeal

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Should either Mr Vass or Scottish Futures Trust wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**13 September 2010**



## Appendix

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### Relevant statutory provisions

#### Freedom of Information (Scotland) Act 2002

##### 1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

##### 2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

##### 30 Prejudice to effective conduct of public affairs

...

- (b) would, or would be likely to, inhibit substantially-

- (i) the free and frank provision of advice; or

...